

PUBLIC PROSECUTOR

v.

CHO KA HENG

HIGH COURT, TEMERLUH

DATO' HJ. LAMIN BIN HJ.

MOHD YUNUS J.

[CRIMINAL TRIAL NO: 45-1-89]

9 DECEMBER 1993

CRIMINAL PROCEDURE: Trial by jury - Not guilty majority verdict of four to three - Whether Judge bound to acquit - CPC s. 229.

CRIMINAL PROCEDURE: Trial by jury - Not guilty majority verdict of four to three - Whether valid - Whether trial a nullity - Whether verdict to be reconsidered - Whether jury to be discharged - CPC ss. 228, 231(b), 234.

CRIMINAL PROCEDURE: Trial by jury - Majority verdict - Minimal majority verdict of five to two - Section 204(ii) CPC - Whether overriding - Whether s. 229 CPC to be read subject to s. 204(ii).

WORDS AND PHRASES: "not unanimous" - Section 228 CPC.

The accused was charged with two capital offences and was tried by jury pursuant to the provisions under Chapter XXII CPC. The facts showed that at the end of the trial a majority verdict of not guilty of four to three was returned by the jury in respect of the two charges. The issue that arose was whether upon such verdict the trial Judge was bound to record a judgment of acquittal or whether, under the circumstance, the Judge ought to require the jury to retire and reconsider their verdict or to discharge the jury and have the case heard before another jury.

Held:

[1] By virtue of the provision of s. 204(ii) CPC, the law appears to be that where a majority verdict is returned, whether the verdict is guilty or not guilty, only a verdict "of not less than five to two" is valid and acceptable. Hence the right view to take is whenever the word "majority" is used in respect of a jury verdict, the word must be read subject to the provision of s. 204(ii) aforesaid.

[2] A verdict of four to three, whether guilty or not guilty, should be considered in the light of the provision of s. 234 CPC and should thus be

a taken as a verdict upon which the jury is unable to agree. However, although the word "may" is used in s. 234 of the Code, that section should not be read as giving the Judge the discretion of accepting a "guilty" majority verdict of four to three. Not only such an interpretation is wrong but it is also unjust to convict a person on such a poor verdict. On the other hand, in a "not guilty" verdict of four to three, it seems permissible for the Judge to accept such verdict as the acceptance thereof does not entail any gross injustice.

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c [3] In the present case, in view of the nature of the issues that the jury had to decide and weigh, it is appropriate to take the option of accepting the verdict of the jury and acquit the accused rather than wasting the time of the Court by having another trial all over again. Furthermore, in a verdict of "not guilty" by a majority of not less than five to two, the position under s. 229 seems to be that the Judge shall have no option but to record a judgment of acquittal even when he does not concur with the verdict. All the more so, in a majority verdict which is less than five to two, i.e. of four to three, one would expect the accused to be acquitted.

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e [Accused acquitted and discharged].

Case referred to:

Lee Koh Eng v. PP [1975] 1 MLJ 132 (refd)

Legislation referred to:

Criminal Procedure Code, ss. 204(ii), 219, 228(i) & (ii), 229, 230, 231 (a) & (b), 234

For the prosecution - Mohd Yazid b. Mustapha, DPP

For the accused - Harpal Singh (Surinder Singh with him); M/s. A.J. Ariffin Chong & Harpal

JUDGMENT

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Hj. Lamin bin Hj. Mohd Yunus J:

In this case the accused was acquitted and discharged on both charges on a majority verdict of the jury. As I believe that one of the grounds, and if not the only ground for attacking the acquittal of the accused on appeal by the prosecution will be the majority verdict which I accepted, I therefore propose to concern myself here only with the verdict of the jury. The accused in this case was preferred with two charges. After the jury had retired to consider their verdict, they reappeared in open court with the view to inform the Judge of their

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verdict. What happened after they had reappeared in open Court were as follows:

As normal, the learned Senior Assistant Registrar, as officer of the Court, put the first question to the foreman thus:

Have you reached a verdict?

The foreman stood up, very nervous, and replied in Bahasa Malaysia:

Ya, kami sudah mencapai keputusan.

Then the SAR asked the foreman in English:

As regards the 1st Charge, is your verdict unanimous or by majority?

In a mouthful, the foreman quickly replied:

Kami telah membincangkan kes ini secara keseluruhan dan kami dapati OKT tidak bersalah bagi kedua-dua tuduhan.

Then the SAR said in Bahasa Malaysia:

Nanti dulu, kita hendak tahu sama ada sebulat suara atau dengan majoriti

The foreman replied, "Majoriti, Empat Tiga", meaning a majority of four to three. The moment the foreman mentioned that the accused was not guilty in both charges, I heard some expression of joy at the dock where the accused was, with his Counsel walking up to him either to congratulate him or to be congratulated, and with s. 204 (ii) of the Criminal Procedure Code at the back of my mind, I then indicated that I may require the jury to retire and reconsider their verdict. The learned defence Counsel then referred me to s. 229, which reads:

If the verdict is not guilty either unanimously or by a majority the Judge shall record judgment of acquittal.

According to him under s. 229, the accused was entitled to an acquittal from a majority verdict by whatever number in the case of a verdict of not guilty. The question is whether s. 229 must be read subject to s. 204 (ii). Section 204 (ii) reads:

The verdict returned shall be unanimous or by a majority of not less than five to two.

I find some difficulty in trying to rationalise the various relevant provisions of the Code. There does not appear to be much problem with a unanimous verdict. With a majority verdict it appears to me that whether the verdict is guilty or not guilty, only a verdict "of not less than

a five to two" is acceptable and valid in law. Then if the verdict is by four to three, is the Judge duty-bound to require the jury to retire and reconsider their verdict or to discharge the jury and to have the case tried before another jury. There is no clear provision in the Criminal Procedure Code. But a Judge may apply his discretion in a majority verdict under s. 228 (i) which reads:

If the jury are not unanimous the Judge may require them to retire for further consideration.

c The literal meaning of the words "not unanimous" is "divided" which must include a majority of four to three. On the other hand, in view of s. 204 (ii), do they mean of not less than five to two. If for some valid reason the Judge is not happy with the majority verdict he can direct the jury to retire and reconsider their verdict.

d After retirement the jury may still deliver a majority [s. 228 (ii)] verdict. However, I take the view that whenever the word "majority" is used, it must subject itself within the meaning of s. 204 (ii). So in the case of a **guilty verdict by a majority** (meaning of not less than five to two) (s. 231) if the Judge concurs, then the judgment shall be entered accordingly [s. 231 (a)]. But if the Judge does not concur, the accused shall be tried again before another jury [s. 231 (b)].

e On the other hand, if the verdict is "not guilty" by a **majority** (s. 229) (meaning of not less than five to two), the Judge shall have no option but to record "judgment of acquittal". In a "not guilty" verdict by a majority (5 to 2 or 6 to 1) under s. 229, there is no provision for a discretionary power of a Judge when he does not concur and because of the word, "shall" appearing in s. 229, it would appear it is mandatory for the Judge to accept the verdict of the jury of "not guilty" and to record the order of acquittal. Similarly in a unanimous guilty verdict (s. 230) because of the word, "shall", the Court is given no discretion but to enter judgment according to the verdict. On reading s. 228 (i) it would appear that when the verdict is not unanimous (meaning five to two or even six to one) whether guilty or not guilty, but if it is so perverse in view of the evidence, the Judge can order the jury to retire for further consideration. But under s. 231 (b) if the verdict is guilty by a majority and the Judge "does not concur" (meaning that it is perverse) and because of the word shall" it appears the Judge has no option but to discharge the jury and the accused "shall be tried again before

another jury". So what is there left for the case under s. 228 (i). Could it be said that only in cases of not guilty with perverse verdict by a majority (of not less than five to two) that the Judge has the discretion to order the jury to retire. But as I have pointed out earlier there is no provision for the Judge when he does not concur" in a "not guilty verdict by a majority" unlike in a guilty verdict [s. 231 (b)] so that the Judge can discharge the jury and order a new trial. So it does appear that only in a case of "not guilty" perverse verdicts by a majority (of not less than by five to two) can the Judge order the jury to retire for further consideration. What about in a case of a majority of four to three. Now from the provisions of the Code, there appear only two situations when the trial Judge can discharge a jury and order a new trial namely one under s. 231 (b) which I have discussed. The other is under s. 234 which reads:

If the jury are unable to agree upon a verdict the Judge after such period as he considers reasonable may discharge the jury.

In the case of *Lee Koh Eng v. PP* [1975] 1 MLJ 132, it was more a question of whether the jury was *functus officio* after delivering their first verdict of "guilty by a majority of 4 to 3". The ratio does not apply in the case before me. If I may note here for clarity, *Lee Koh Eng* was decided under the provisions of the Criminal Procedure Code of the Straits Settlements (Cap. 21) in which provision similar to s. 204 (ii) of our present Code is absent. In Cap. 21 except for the words "not unanimous" in s. 219 (i) which is in *pari materia* with our s. 228 (i), wherever the word "majority" appears in other sections (Cap. 21), it is qualified with the words "of not less than five to two." However for our present purpose if I may cite the words of the then Chief Justice, the Honourable Tan Sri S.S. Gill (delivering the judgment of the Federal Court) thus:

Sections 220, 221 and 222 stipulate what a Judge may do where a verdict is either unanimous or by a majority of not less than five to two. These provisions appear to indicate that unless there is unanimity or the requisite majority, it would be for the Judge to treat it as "if the jury are unable to agree" and "discharge the jury."

(Please note that s. 225 of Cap. 21 is in *pari materia* with our s. 234 of Cap 6.)

It does appear from those words that in a case of a verdict of four to three it must be considered

a as if the jury "are unable to agree". Perhaps it embraces both "guilty" and "not guilty" verdicts.

Because the jury is unable to agree upon a verdict (the verdict being four to three) whether the decision is guilty or not guilty, the trial may result in a nullity so that there will be a fresh trial with a new jury. But with the word "may" being used in s. 234, it does not appear to be mandatory for the Judge to discharge the jury. One would have thought that if 4 to 3 verdict is no verdict so that the trial is a nullity, then the Judge would have no discretion and that he "shall" discharge the jury and not "may". If the Judge has a discretion then, he "may" or "may not" discharge the jury. If he does not discharge the jury, then he shall proceed to make the consequential pronouncement in that for example in a guilty verdict (4 to 3) he shall then pronounce the accused guilty and sentence him accordingly. But again not only that will be wrong but also unjust to convict a person on such "poor" verdict of 4 to 3. On the other hand in a not guilty verdict (4 to 3), if the Judge accepts it for certain reasons perhaps there may not be such gross injustice and may even be permissible. I say permissible because in a majority (not less than 5 to 2) verdict of not guilty under s. 229, it is mandatory a judgment of acquittal be recorded. All the more so in a majority verdict which is less than 5 to 2 (i.e. 4 to 3) one would expect the accused to be acquitted.

e Having said all that, for myself, in view of the evidence before me in that it was a question of identification of the accused that the jury had to decide and that the evidence of the defence in the form of a statement from the dock that the jury had to weigh I thought that in order not to waste the Court's time and public fund by having another trial all over again, I took the option of accepting the jury's verdict and acquitted the accused.

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